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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–77

DELORES NORWOOD, ET AL., APPELLANTS

v.

D. L. HARRISON, SR., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Whether the distribution of state-owned textbooks to private racially segregated schools, formed to avoid the effective desegregation of the public schools, should have been enjoined as action in violation of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing school desegregation under the 1964 Civil Rights Act, 42 U.S.C. 2000c–6, 2000d, and 2000h–2. In furtherance of that responsibility, the United States has participated in desegregation actions involving more than

seventy school districts in the State of Mississippi and other litigation, such as *Coffey and United States* v. *State Educational Finance Commission,* 296 F. Supp. 1389 (S.D. Miss.), and *United States* v. *Tunica County School District,* 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F.2d 377 (C.A. 5), contesting various forms of state aid to private segregated schools. In addition, federal statutes [1] and regulations [2] specifically prohibit recipients of Emergency School Assistance Program (ESAP) funds from providing aid to nonpublic schools which practice racial discrimination. The government's enforcement responsibility under the above statutes, cases and regulations, includes taking action to prevent States from providing support or aid to racially segregated schools in violation of the Equal Protection Clause of the Fourteenth Amendment.

Although the government did not participate in this case in the court below, the issues presented are related to those presented in cases where the government is a party.[3] The outcome here will thus directly affect the government's enforcement responsibilities under federal law. Our participation here as *amicus* is consistent with the government's participation in such other school desegregation cases as *Brown* v. *Board*

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[1] Office of Education Appropriation Act, 1971, Pub. L. 91-380, 84 Stat. 800.

[2] 45 C.F.R. Part 181, 36 Fed. Reg. 16546 (1971).

[3] The United States is appellant in *Graham and United States* v. *Evangeline Parish School Board*, No. 72-3033 (C.A. 5, appeal pending), involving a similar scheme for the distribution of textbooks and, additionally, the provision of transportation to students attending a private segregated school in Evangeline Parish, Louisiana.

of Education, 347 U.S. 483; *Brown* v. *Board of Education*, 349 U.S. 294; *Cooper* v. *Aaron*, 358 U.S. 1; *Goss* v. *Board of Education*, 373 U.S. 683; *Green* v. *County School Board of New Kent County*, 391 U.S. 430; *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1; and *Wright* v. *Council of the City of Emporia*, 407 U.S. 451.

STATEMENT

Since the parties have dealt extensively with the factual record, we include here only a brief review of the background of the case, and a summary statement of the evidence.

While the issue raised on this appeal was presented to the district court by means of a separate complaint and hearing, the complaint was filed by parents of children in Tunica County school district (App. 20), which has a long history of school desegregation litigation, and the contested action by the defendant state officials occurred at a time when substantial statewide desegregation was imminent. Consequently, much of the factual record here is also contained in the record of the desegregation litigation involving the Tunica County schools, and the purpose and effect of the contested state action here can be more fully evaluated with reference to the circumstances in the 1969–1970 school year reflected in the records of desegregation cases throughout the State. The circumstances at that time in Tunica County, where the appellants reside, were described by the district court

in *United States* v. *Tunica County School District*, 323 F. Supp. 1019, 1023 (N.D. Miss.), affirmed, 440 F. 2d 377 (C.A. 5), as follows:

> On February 2, 1970, the first day of the second semester [when a terminal desegregation plan was to be implemented], no white child enrolled at any of the district schools. Instead, the Tunica Church School opened with an all-white faculty composed of 21 teachers, 18 of whom had refused reassignment in public schools and were paid the remainder of their salaries. * * * All or almost all of the 340 students attending the church school had been enrolled in the Tunica County public schools during the first semester, and none of the 428 white students attending the public schools during the first semester enrolled in them during the second semester. The Tunica Church School charged no tuition of its students and its teachers received no remuneration for their services during the second semester. * * * The students used the same textbooks which they kept in their possession after leaving the public schools [footnotes omitted].

While the district court in that case enjoined state salary payments to former public school teachers for teaching in the Tunica Church School (*id.* at 1028), the private plaintiffs' request for an injunction preventing the loan of textbooks to the students in the private school became moot when the Tunica Church School was disbanded and the books were returned to the public school officials at the end of the 1969-1970 school year. 323 F. Supp. at 1025, n. 7, and 1028. When the Tunica County Institute of Learning

opened in the 1970–1971 school year, however, the county's white students, now enrolled in the Institute, were again provided textbooks by the State.[4] Consequently, the appellants filed the complaint in this action on October 9, 1970, alleging that the actions of the appellees frustrated the attainment of a "racially integrated and otherwise non-discriminatory public school system" in Tunica County and constituted unconstitutional "state aid and encouragement to racially segregated education * * *" (App. 21). Appellants sued as a class "in behalf of students throughout the state of Mississippi who are aggrieved by the policies and practices of defendants complained of herein" (App. 20), and requested relief which in effect would require appellees to recall textbooks distributed, and would prohibit further distribution of textbooks, for the use of students enrolled in private racially segregated schools in the State (App. 21–22). The request for relief was later refined by specifying 148 private segregated schools to be affected by the requested relief (Appellants' Brief, p. 6).

Appellants introduced evidence to show that the all-white private schools involved were formed from 1963 to 1970 in local school districts affected by impending

[4] In August 1970, the regulations governing textbook distributions were changed so books were provided directly to each private and parochial school, rather than being distributed through local public school superintendents, as before (Jan. 25, 1971 Dep. of Snowden, pp. 8, 39). The new procedure was designed to avoid federal restrictions on aid to racially segregated schools by recipients of federal educational assistance funds (July 6, 1971 Dep. of Snowden, p. 43). See Jurisdictional Statement, p. 15 n. 14; see also *infra*, p. 16.

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court-ordered desegregation plans.[5] The evidence further showed that these private schools were all-white (with a few children of other, non-black races, see App. 32–36) and had policies of racial exclusion,[6] that they were formed for the purpose of avoiding attendance by their students at public desegregated schools,[7] and that appellees were aware of the purpose of the schools.[8] Appellees had long provided textbooks for the use of students in both public and private schools under existing state statutes and regulations; but, in expectation of the mid-year opening of many all-white private schools after annual textbook allotments were exhausted, appellees adopted a scheme of distribution of textbooks which was contrary to their regulations because the organizers of the private schools were "going to need books."[9] Upon formation of the private schools, almost all of the white students in the public schools in some school districts withdrew to attend the newly formed all-white private schools.[10] Thus, the public schools, or some public schools, in these districts remained all, or virtually all, black.

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[5] (App. 44–49); J.S. App. 16a–17a. See, also, *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389, 1391 (S.D. Miss.).

[6] See, *e.g.*, Dep. of McLean and Owen, p. 53; Dep. of Tinsley, p. 37; Dep. of Garrett, p. 11; Dep. of Mosely, p. 17; Dep. of Smithers, p. 14.

[7] See *e.g.*, Dep. of Daniels, pp. 10, 11; Dep. of Barbour, pp. 6, 7; Dep. of Isbell, pp. 17–23; Dep. of Wilson, pp. 5–7; Dep. of Boggan, p. 9.

[8] Ex. A to Dep. of Floyd.

[9] *Id.*

[10] See Appellants' Brief, pp. 14–19.

The court below assumed the accuracy of this evidence,[11] but considered it irrelevant, because the textbooks were distributed, under a long-standing statute enacted without racial motive, to all children "of whatever race * * * without question or impediment." J.S. App. 15a, 20a. The court found no inconsistency with the holding in *Green* [12] that the State has an affirmative obligation to convert to a unitary desegregated school system, because statewide less than ten percent of the student population attend private schools and because under the *Everson* [13] and *Allen* [14] decisions the provision of textbooks would not be considered impermissible state aid to the private schools. J.S. App. 15a–16a, 20a–21a.[15] Accordingly, relief was denied and the complaint dismissed.

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[11] While the district court did not make extensive, specific findings concerning the particular private schools at issue, in framing the question presented it said (J.S. App. 16a):

> We are thus brought to the point of determining whether the state's furnishing of free textbooks to students attending racially segregated schools is a support of such schools * * *.

[12] *Green* v. *County School Board of New Kent County*, 391 U.S. 430.

[13] *Everson* v. *Board of Education*, 330 U.S. 1.

[14] *Board of Education* v. *Allen*, 392 U.S. 236.

[15] The district court appears also to have been of the view that the provision of free textbooks should not be considered aid and encouragement to private schools because "[t]here is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools, now unitary." J.S. App. 21a.

SUMMARY OF ARGUMENT

1. The district court's reliance on the line of cases involving state support of secular education in church-related schools is misplaced. That line of authority applies significantly different constitutional requirements than are involved here, and permits state support (within constitutional limitations) for the secular education provided in parochial schools as "productive of a benevolent neutrality" which properly reconciles the values reflected in the Establishment and Free Exercise Clauses of the First Amendment. *Walz* v. *Tax Commission,* 397 U.S. 664, 669. The Fourteenth Amendment, however, forbids state support of racially segregated schools "through any arrangement, management, funds or property * * *." *Cooper* v. *Aaron,* 358 U.S. 1, 19.

2. In determining whether a State has become impermissibly implicated in private discriminatory acts in violation of the Fourteenth Amendment, the courts consider the purpose, effect, and surrounding circumstances of the State's acts on a case by case basis. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715. The appellants here challenge the constitutionality of the Mississippi textbook statute as applied in relation to efforts to desegregate the State's public school systems. Therefore, the effects and circumstances relevant to decision here are those at the time of the statute's challenged applications, rather than at the time of its enactment. In applying the statute in this case, the State first ignored its regulations thereunder in order to assure the availability of free text-

books for use in segregated private schools opening in midterm, and then modified those regulations to avoid the intended non-discriminatory effects of a federal educational assistance program. Despite authority to do so, it has never attempted to condition the loan of textbooks on adoption by recipient schools of nondiscriminatory racial policies. In light of all the circumstances surrounding the establishment and operation of the segregated private schools at issue here, the State's furnishing of free textbooks for use in those schools impermissibly implicated it in private racial discrimination in violation of the Fourteenth Amendment.

3. The furnishing of textbooks challenged here also had the effect of impeding desegregation of the public schools in particular school districts. To the extent that it did so, it was inconsistent with the State's obligation under *Green* v. *County School Board of New Kent County*, 391 U.S. 430, to promote desegregated public education in converting from dual to unitary public school systems.

ARGUMENT

I. THE STANDARDS APPLIED IN TESTING STATE ACTION UNDER THE RELIGION CLAUSES OF THE FIRST AMENDMENT ARE NOT APPLICABLE IN THIS CASE

The district court erred, we submit, in relying on distinctions which this Court has articulated in cases involving the validity of educational assistance programs challenged under the First Amendment. There are significant differences between the constitutional standards of the Establishment and Free Exercise

Clauses governing the States' relationships with church-related education, on the one hand, and the standards of the Equal Protection Clause with respect to state involvement in racial discrimination, on the other hand.

The First Amendment prohibits any law "respecting an establishment of religion," and protects "the free exercise" of religion from governmental interference. In an attempt to steer a "neutral course between the two Religion Clauses," *Walz* v. *Tax Commission*, 397 U.S. 664, 668,[16] this Court has upheld state programs which, without excessive state entanglement and without discrimination, provide church-related schools with "government aid in the form of secular, neutral or non-ideological services, facilities, or materials * * *." *Tilton* v. *Richardson*, 403 U.S. 672, 687. Such programs are part of the States' "long history of amicable and effective relationships with church sponsored schools," *Wisconsin* v. *Yoder*, 406 U.S. 205, 236, and are consistent with the Establishment Clause. *Lemon* v. *Kurtzman*, 403 U.S. 602, 612–613; *Tilton*, *supra*.

The policy of "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference," *Walz*, *supra*, 397 U.S. at 669, has no counterpart in the interpretation of the Equal Protection Clause. Racial discrimination by private persons, in contrast to the exercise of religion, enjoys no special constitutional immunity, and indeed is subject

[16] *Tilton* v. *Richardson*, 403 U.S. 672, 677, also refers to "the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause."

to special remedial legislative power under Section 2 of the Thirteenth Amendment, and is unlawful in many contexts.[17] The considerations relevant in cases under the Establishment and Free Exercise Clauses, therefore, bear little relation to the question whether state aid to racially segregated private schools is consistent with the Equal Protection Clause. This Court, in considering state action that supports private discrimination, has recognized the difference[18] and has declared unequivocally that state support of segregated schools "through any arrangement, management, funds or property cannot be squared with the [Fourteenth] Amendment * * *." *Cooper* v. *Aaron*, 358 U.S. 1, 19.

For these reasons, the decisions in cases involving the Religion Clauses (including *Board of Education* v. *Allen*, 392 U.S. 236) do not inform a court's judgment in a case, such as this, which is concerned with a very different constitutional requirement, and which does not involve private action under explicit

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[17] See, *e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409; 42 U.S.C. 2000a, *et seq.* (discrimination in public accommodations); 42 U.S.C. 2000e, *et seq.* (equal employment opportunity); 42 U.S.C. 3601, *et seq.* (fair housing); Executive Order 11063, 27 Fed. Reg. 11527 (1962) (equal opportunity in housing); Executive Order 11246, 30 Fed. Reg. 12319 (1965) (nondiscrimination by government contractors and subcontractors). Compare *Wisconsin* v. *Yoder*, 406 U.S. 205, 216; *Sherbert* v. *Verner*, 374 U.S. 398. See, also, *Pierce* v. *Society of Sisters*, 268 U.S. 510.

[18] Compare *Walz* v. *Tax Commission*, *supra*, with *Coit* v. *Green*, 404 U.S. 997, affirming *Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C.). See also the concurring opinion of Mr. Justice White in *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 671 n. 2.

constitutional protection. The principles relevant to decision here are instead to be found in cases determining whether particular state action violates the Equal Protection Clause of the Fourteenth Amendment, and forbidding state support of racially segregated schools.

II. THE FURNISHING OF FREE TEXTBOOKS HERE CONSTITUTED IMPERMISSIBLE STATE INVOLVEMENT IN THE RACIAL DISCRIMINATION PRACTICED BY THE PRIVATE, SEGREGATED ACADEMIES

This Court has declined to attempt to fashion and apply a precise formula for identifying state responsibility under the Equal Protection Clause. Rather, the Court has said that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. In judging particular state action, it is appropriate to consider facts showing "'* * * its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its [occurrence].'" *Reitman* v. *Mulkey*, 387 U.S. 369, 373. Thus, it is pertinent to isolate the specific state action which is challenged and to consider its historical context.

In our view, the court below erred in directing its attention here principally to the circumstances surrounding the enactment of the statute under which the state-owned textbooks were distributed. Appellants' complaint is not that the statute, as enacted, is unconstitutional; their contention is that it is un-

constitutional as applied. It is only the distribution of books by state officials to pupils at specifically named private segregated schools that is here challenged under the Equal Protection Clause. Hence, the history of the statute's enactment and prior application is largely irrelevant; it is instead the factual circumstances surrounding the particular challenged distribution of the books that should be "sifted" in determining whether the state involvement is constitutionally proscribed.

The relevant factual context here, therefore, is the process of implementation of the *Brown* decision in the Mississippi public schools. In 1963, when the first Mississippi school desegregation suits were filed (*Evers* v. *Jackson Municipal Separate School District*, 328 F. 2d 408 (C.A. 5)), there were only 17 private non-Catholic schools in the entire State (App. 40–41). In 1970, there were 155 (App. 42). The establishment and expansion of a private, segregated network of schools closely paralleled the ordering by the courts of effective desegregation of the public schools (App. 44–49). The State attempted to aid the persons participating in those private segregated schools through such measures as tuition grants; but all such attempts were invalidated by the federal courts. See, *e.g.*, *Coffey and United States* v. *State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss.); *Coffey and United States* v. *State Educational Finance Commission* (S.D. Miss., C.A. No. 3906, decided September 2, 1970) (unreported).[10]

[10] The second *Coffey* decision concerned a statute providing for tuition loans rather than grants. For cases involving similar legislation in other States, see *Griffin* v. *State Board of*

For the most part, the new private schools were established and operated on the "thinnest financial basis." *Coffey, supra,* 296 F. Supp. at 1392. Prior to 1969 there were 69 such schools operating in the State (App. 42). After this Court's decision in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19, the number increased by fifty-five, with most opening in mid-term of the 1969–1970 school year (App. 42). After successful efforts in the spring and summer of 1970 by the Department of Justice and the Department of Health, Education, and Welfare to bring the remaining school districts in the State into compliance, an additional 31 private schools opened in September 1970 (App. 42).

Shortly after the *Alexander* decision, and in anticipation of the opening of a substantial number of

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Education, 239 F. Supp. 560 (E.D. Va.) (3-judge court); 296 F. Supp. 1178 (E.D. Va.) (3-judge court); *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala.) (3-judge court); 267 F. Supp. 458 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States*, 389 U.S. 215; *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La.) (3-judge court), affirmed *per curiam*, 365 U.S. 569; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La.) (3-judge court), affirmed *per curiam*, 368 U.S. 515; *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.) (3-judge court), affirmed *per curiam*, 389 U.S. 571; *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686 (E.D. La.) (3-judge court), affirmed *per curiam*, 393 U.S. 17; *Aaron* v. *McKinley*, 173 F. Supp. 944, 952 (E.D. Ark.) (3-judge court) affirmed *per curiam sub nom. Faubus* v. *Aaron*, 361 U.S. 197; *Brown* v. *South Carolina State Board of Education*, 296 F. Supp. 199 (D. S.C.), affirmed *per curiam*, 393 U.S. 222; *Hawkins* v. *North Carolina State Board of Education*, 11 Race Rel. L. Rep. 745 (W.D. N.C.) (3-judge court).

private segregated schools, the Executive Secretary of the Mississippi Textbook Purchasing Board circulated a memorandum to the local school superintendents, noting that "all the money has been allotted for this year," and therefore directing them "to transfer books with the student as he transfers to the private school * * *."[20] This was contrary to the state regulation, which provided that "upon [his] transfering to another school * * * all books shall be returned by the pupil * * *" (Pl. Ex. 12 to Jan. 25, 1971 Dep. of Snowden). Consequently, while most of the newly-formed private schools opened in makeshift facilities and with volunteer or underpaid faculty, their operation as schools was facilitated by this deviation from normal practice by the state officials responsible for textbook distribution. Moreover, the immediate availability of the same textbooks previously used enabled the students in the new segregated private schools to pursue essentially the same courses of study formerly provided them in the public schools, and thus facilitated the students' transfer by minimizing the resulting disruption of studies.[21]

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[20] Ex. A to Dep. of Floyd.

[21] A particularly flagrant example occurred in Tunica County, where the plaintiffs in this case reside. Upon desegregation at mid-term, the school board paid a semester's salary to 18 white teachers who resigned from the public school system and went to teach at the newly formed all-white private school (see p. 4, *supra*). In *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F. 2d 377

State officials have also taken special measures to insure the continued provision of the textbooks to students in these private schools. When the distribution scheme followed for almost 30 years would have required either the termination of aid to segregated private schools or relinquishment of federal financial assistance to the public schools under the Emergency School Assistance Program established by Pub. L. 91–380, 84 Stat. 803–804, the distribution procedure was changed in August 1970 to establish separate accounts for the private schools.[22]

Although it has authority to "promulgate * * * rules as may be necessary for the proper administration of [the Textbooks Act]," Section 6641(1)(a), Miss. Code of 1942 Ann. (1972 Cum. Supp.), the Textbook Purchasing Board has never promulgated a regulation prohibiting recipient schools from discriminating on the basis of race or color. In similar circumstances the failure of the State to use its regulatory powers to pro-

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(C.A. 5), the district court described the situation as follows (323 F. Supp. at 1023):

"The church school held organized classes in which, for the most part, teachers and students met as they had during the first semester in the Tunica Elementary and High School * * *."

[22] Jan. 25, 1971 Dep. of Snowden, pp. 8, 39. Previously, orders were transmitted through and distribution was made through the local school superintendents, but the federal Act made it unlawful for recipients to participate in the transfer of property to segregated schools, Pub. L. 91–381, 84 Stat. 804. In spite of this change in the distribution procedure, the State Board still relies on the judgment of the local superintendents in determining whether a private school qualifies for free state textbooks (July 6, 1971 Dep. of Snowden, pp. 30, 43).

hibit racial discrimination by a lessee of State property violated the Equal Protection Clause, since "* * * no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." *Burton, supra,* 365 U.S. at 725.

This case thus involves a continuous effort by State officials to encourage or facilitate the formation and continued operation of private segregated schools. The educational function performed by those institutions is one which the State would otherwise perform on an integrated basis. Compare *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 173, 175. Moreover, in contrast to the State regulatory functions involved in *Moose Lodge,* the State here has provided a valuable benefit which aids the schools in a manner directly related to their functioning specifically as schools.[23] Nothing in the opinion of the court below suggests the contrary.[24]

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[23] The provision here of free textbooks to the schools' students, to be used as the very implements of their education in these schools, contrasts with such matters as the provision of electrical and water services or police and fire protection to the schools on the same basis that those services are provided to all persons and facilities in the community. The provision of such neutral services to all does not implicate the State in the activities of the various recipients and therefore raises no constitutional question.

[24] The court's observation that there was no showing that any child, if deprived of free textbooks, would withdraw from a segregated school and re-enroll in the public schools (J.S. App. 21a) misconceives the quantum of state aid necessary to constitute a violation of the Equal Protection Clause. See *Cooper* v. *Aaron, supra,* 358 U.S. at 19; *Robinson* v. *Florida,* 378 U.S. 153; *Lombard* v. *Louisiana,* 373 U.S. 267; *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230.

While the free textbooks statute is racially neutral on its face and "began without racial motivation" (J.S. App. 20a), the circumstances here reflect intentional state involvement in and support of the discriminatory actions of the private segregated schools.[25] The State is thus implicated in private discrimination in violation of the Equal Protection Clause, and the appellants are entitled to the relief requested.

III. THE FURNISHING OF TEXTBOOKS CHALLENGED IN THIS CASE IMPROPERLY AIDS PRIVATE SEGREGATED SCHOOLS WHICH HAVE ADVERSELY AFFECTED DESEGREGATION OF PUBLIC SCHOOLS IN SOME SCHOOL DISTRICTS OF THE STATE

Even if this Court were to disagree with our contention in Point II, *supra*, that appellants are entitled to the full measure of relief they are seeking, it should, at a minimum, order the district court to enjoin free textbook distribution for use in those private schools which have substantially impeded desegregation of the

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[25] Therefore, on this record, the provision of textbooks to these schools was not simply one of the "products of the State's traditional policy of benevolence toward charitable and educational institutions," *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 854 (E.D. La.), affirmed *per curiam*, 389 U.S. 571, or "the fruits of a benevolent racially neutral policy," *Poindexter* v. *Louisiana Financial Assistance Commission*, 296 F. Supp. 686, 687 (E.D. La.), affirmed *per curiam*, 393 U.S. 17. Instead, the assistance was "the product of the State's affirmative purposeful policy of fostering segregated schools and [had] the effect of encouraging discrimination." *Poindexter*, *supra*, 275 F. Supp. at 854. Thus, even under the language in the *Poindexter* cases cited by the district court (J.S. App. 18a–19a) in the particular circumstances shown here the provision of textbooks to the identified segregated schools constituted prohibited state involvement in private segregation.

public schools from which they have drawn students. In States, such as Mississippi, where racial segregation has previously been compelled by state law, State officials must act in a manner consistent with their obligation to promote a desegregated public education which is free of racial discrimination. *Green* v. *County School Board of New Kent County*, 391 U.S. 430. And in assessing their actions, even under long-standing, facially neutral statutes, "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of the City of Emporia*, 407 U.S. 451, 462. See, also, *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43.

Here, the court below minimized the effect of the private segregated schools on desegregation of the public schools by stating that 90 percent of the State's educable children continued to attend public schools (J.S. App. 20a–21a). But the record shows [26] that the effect of the operation of private segregated schools in some school districts has been the reestablishment of almost total racial segregation, with most white students in private schools and the black students in the public schools.[27] The withdrawal of white students from a school system does, of course, impede the desegregation process. *Wright, supra*, 407 U.S. at 463; *United States* v. *Scotland Neck Board of Education*, 407

[26] See Appellants' Brief, pp. 13–19; *United States* v. *Tunica County School District*, 323 F. Supp. 1019 (N.D. Miss.), affirmed, 440 F. 2d 377 (C.A. 5).

[27] "[W]e do not close our eyes to the facts in favor of theory. * * * [D]ual school systems must cease to exist in an objective sense as well as under the law." *Wright, supra*, 407 U.S. at 472 (Burger, C.J., dissenting).

U.S. 484, 490. And state officials are as responsible as local school officials for insuring effective desegregation of local school districts. *Scotland Neck, supra,* 407 U.S. at 488–489; *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 475–476 (M.D. Ala.), affirmed *sub nom. Wallace* v. *United States,* 389 U.S. 215; *United States* v. *State of Texas,* 321 F. Supp. 1043, 1056–1057 (E.D. Texas), affirmed, 447 F. 2d 441 (C.A. 5), certiorari denied, 404 U.S. 1016.[28] In the present case, as in *Wright* and *Scotland Neck,* the determination of the constitutionality of a particular state action cannot be based simply on the overall, statewide effect of the action; its effect on desegregation in the particular local school district affected must be considered.[29]

To the extent, therefore, that the effect of the distribution of books for use in any particular schools was to aid in the continuation of a dual school system in particular school districts, appellants are clearly entitled to relief (see, *e.g.,* Appellants' Brief, pp. 14–19). For example, in Tunica County the establishment of Tunica Institute of Learning has resulted in the continuance of almost total racial segregation in the education provided in that school district. The record contains evidence showing the same or similar results

[28] See, also, *Edgar* v. *United States,* 404 U.S. 1206, 1207 (Black, J., opinion on application for stay).

[29] Desegregation can, indeed, be unconstitutionally impeded even if only part of a particular school district is denied a unitary system of education. *Davis* v. *Board of School Commissioners of Mobile County,* 402 U.S. 33; *United States* v. *Scotland Neck Board of Education, supra,* 407 U.S. at 491 (Burger, C.J., concurring).

from the operation of others of the 148 private, segregated schools as to which the plaintiffs sought relief. Effective desegregation of the public schools in those school districts has been wholly frustrated by the formation and continued operation of such private schools. State aid, such as the provision of textbooks, which supports the educational functions of those institutions to any substantial degree and thus contributes to the continuation of dual school systems in these districts is inconsistent with the State's responsibilities as defined in *Green*. Accordingly, at least to the extent that the appellees have provided state-owned textbooks for the use of students attending such private schools, their action should be enjoined. However, for reasons stated in Point II, *supra*, we believe that the broader relief sought by appellants is also warranted on the facts of this case.[30]

[30] That relief would not, of course, apply to schools which demonstrate that their existence does not perpetuate dualism, and that in all respects they operate on a racially nondiscriminatory, integrated basis.

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MICHAEL RODAK, JR

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v.

D. L. HARRISON, SR., *et al.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

1. Appellees assert that our references to "target" school districts to illustrate a network of private segregationist academies is inconsistent with the district court's finding that 90% of the State's educable children remain in public schools. (Appellees' Brief, p. 2.)

In fact, the district court's reference to "90% of the state's educable children" (*Norwood* v. *Harrison*, 340 F. Supp. 1003, 1013 (N.D. Miss. 1972)), is misleading. That statistic counts black and white students attending public schools and therefore provides little insight into the extent of white exodus from public schools. Moreover, the statewide statistic includes districts which are majority or overwhelmingly white in student enrollment and which therefore experienced negligible white resistance to public school desegregation. An examination of enrollment statistics for

the 33 majority white districts desegregating "voluntarily" under HEW supervision shows that white enrollment *increased* by 5,500 students, or by 7% from 1968-69 to 1970-71. In contrast, the 56 majority black school districts of the State filing enrollment reports with HEW experienced a loss of 30,000 white students, or 40% of their total white enrollment, between 1968-69 and 1970-71. (Henderson Deposition, Exhibit 10, *Number of Students by Race in Mississippi School Districts Based Upon Reports Submitted by School Districts to HEW;* Exhibit 11, *Mississippi Public School Districts Presently Desegregating Under HEW Guidelines and Without Court Order.*[1]

2. The State—as it has done in all previous cases of this kind—disputes the charge that the segregated academies of the State are "segregationist" and refers to the testimony of private school superintendents that their institutions were formed to provide "quality education" and have "open enrollment" policies. (Appellees' Brief, p. 2.)

This question of fact has been resolved against the State by every trial court faced with the issue of state aid to Mississippi academies. In *Coffey* v. *State Educational Finance Commission,* 296 F. Supp. 1389, 1392 (S.D. Miss. 1969), the court refers to the network of academies as a "system of private schools operated on a racially segregated basis as an alternative available to white students seeking to avoid desegregated public schools." In *Coffey II,* the same three-judge district court held that Mississippi's second tuition grant statute, enacted in September, 1969, was an attempt "to provide state assistance to students who leave newly integrated public schools to attend private

[1] Appellants are proceeding in *forma pauperis* and, in accordance with instructions received from the Clerk, none of the 104 depositions included in the record are reproduced in the Appendix.

schools." *Coffey* v. *State Educational Finance Commission*, Civil No. 3006 (S.D. Miss., September 2, 1970) (unreported). In *Green* v. *Kennedy*, 309 F. Supp. 1127, 1134 (D. D.C. 1970), the academies are described as having "been established in Mississippi for the purpose of avoiding the result of a unitary, non-racial public school system required by the Federal court decisions outlawing segregation in public schools, and in an attempt to maintain a broad pattern of racial segregation in the school system." And in the instant case the district court has referred to the academies as having "been formed throughout the state since the inception of public school desegregation." *Norwood, supra*, 340 F. Supp. at 1011.

Judge Wisdom has characterized the testimony of Louisiana private school personnel that their academies have "open enrollment" policies as "incredible"; such policies would come as "a surprise and shock to the parents who have children attending these schools." *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833, 848 (E.D. La. 1967). Judge Goldberg thinks that judges would have to be "more naively unsophisticated than this job allows" to accept such testimony. *Wright* v. *City of Brighton, Ala.*, 441 F.2d 447, 453 (5th Cir. 1971). The district courts have uniformly recognized that the state's argument is a "disingenuous quibble . . . resting on the assumption that federal judges are more naive than ordinary men." *United States* v. *City of Jackson*, 318 F.2d 1, 5 (5th Cir. 1963).

3. Appellees, without citation to the record, assert that "many" of the academies operate in new facilities and "virtually none" use former public school properties. (Appellees' Brief, p. 2.)

The record shows that of the 52 academies for which information is available only 4 operate in newly constructed